

Supreme Court, U.S.
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No 83 - 1249

IN THE
Supreme Court of the United States
October Term, 1983

JOHN CARY SIMS and SIDNEY M. WOLFE,
Petitioners,

v.

CENTRAL INTELLIGENCE AGENCY and
WILLIAM J. CASEY, DIRECTOR,
CENTRAL INTELLIGENCE AGENCY,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

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January 1984

(i)

QUESTION PRESENTED

Did the court of appeals err by affirming, without explanation, the district court's decision to permit the Central Intelligence Agency to withhold the names of institutions at which MKULTRA research was conducted, even though the institutions themselves are not "intelligence sources" within the meaning of 50 U.S.C. § 403(d)(3), and even though the CIA failed to present any evidence to show that disclosure of the institutions would lead to identification of researchers?

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John Cary Sims and Sidney M. Wolfe, M.D., hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case. This petition is conditioned on the granting of the petition for a writ of certiorari filed by petitioners Central Intelligence Agency and William J. Casey, Director, Central Intelligence Agency, in No. 83-1075, which seeks review of the same judgment. Mr. Sims and Dr. Wolfe will file an opposition to that petition.

In the event that respondents' petition is denied, Mr. Sims and Dr. Wolfe do not request that the Court grant this petition.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 709 F.2d 95.* The opinions and order of the district court (Pet. App. 21a-34a) are not reported. An earlier opinion of the court of appeals (Pet. App. 35a-65a) is reported at 642 F.2d 562. One of the earlier opinions of the district court (Pet. App. 66a-72a) is reported at 479 F. Supp. 84; the other earlier opinion of the district court (Pet. App. 73a-97a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1983 (Pet. App. 19a-20a). A petition for rehearing was denied on August 17, 1983 (Pet. App. 17a-18a). On November 9, 1983, the Chief Justice extended the time in which to file a petition for a writ of certiorari to December 15, 1983, and on December 5, 1983, the Chief Justice further extended the time to file a petition for a writ of certiorari to December 29, 1983. On that date, the Central Intelligence Agency ("CIA"), and William J. Casey, Director, Central Intelligence Agency filed a petition for a writ of certiorari, and the petition was received by counsel for petitioners in this action the following day. Pursuant to Rule 19.5 of the Rules of this Court, a cross-

*"Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari filed by petitioners Central Intelligence Agency and William J. Casey, Director, Central Intelligence Agency, in No. 83-1075, which seeks review of the same judgment.

petition may be filed within thirty days of the receipt of a petition for a writ of certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. § 552, provides, in relevant part:

(b) This section does not apply to matters that are —

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld....

Section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. § 403(d)(3), provides in relevant part:

... [T]he Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure....

STATEMENT OF FACTS

The procedural history of this case is given in the statement on pages 2-8 of the petition for a writ of certiorari filed in No. 83-1075. However, several additional points should be made with respect to the records that are at issue on this cross-petition, *i.e.*, records reflecting the names of the institutions at which MKULTRA research was conducted.

Petitioners argued before the court of appeals that the district court erred by allowing the CIA to withhold the identities of all institutions at which exempted researchers performed their subprojects. In making this argument, petitioners emphasized that there was no evidence to show that identification of institutions would lead to identification of researchers. Thus, they pointed out that the CIA had released the identities of 59 of the 80 institutions, which had consented to the release of their names, even though the identities of the researchers were still withheld. In addition, the record was clear that most of the institutions involved were major universities, such as Harvard University, Stanford University, and the Massachusetts Institute of Technology, and that these institutions had no knowledge that CIA-sponsored research was being conducted on campus. Pet. App. 74a. Moreover, the research was conducted twenty to thirty years ago. For these reasons, petitioners argued that it was highly unlikely that the disclosure of the institutions could lead to the revelation of the researchers.

However, the court of appeals' decision did not address this issue, let alone discuss how the agency could have met its burden of demonstrating *de novo* that the names of the institutions qualified as "intelligence sources." But its decision remanding the case to the district court for consideration of the researchers' status, and its statement that the district court's judgment is otherwise affirmed, indicate that the court implicitly affirmed the district court in this regard. In order to clarify this and other questions, petitioners sought rehearing, but the petition was denied without explanation.

REASONS FOR GRANTING THE WRIT

For the reasons that will be set forth in our opposition in No. 83-1075, that petition for a writ of certiorari should be

denied. If that petition is granted, however, the Court should also grant this cross-petition, so that it may review the entire judgment of the court of appeals.

In its decision, the court of appeals failed entirely to address one of the major arguments presented for review: whether the district court had erred in permitting the CIA to withhold the identity of any institution at which exempted researchers performed their research. Although this point was extensively discussed in the briefs filed by both parties, the court of appeals' opinion does not address it at all, creating the impression that it intended to affirm the district court on this issue. No explanation is given for the court's failure to afford petitioners a considered resolution of their appeal. Moreover, an additional effect of the decision is to deny the petitioners, the public, the agency, and the district court guidance on an important and recurring issue in Freedom of Information Act litigation — the extent to which an agency must prove that identification of a non-confidential entity will lead to disclosure of a confidential source. *See, e.g., Gardels v. CIA*, 689 F.2d 1100 (D.C. Cir. 1982).

We do not ask this Court to decide whether this issue, standing alone, warrants the Court's consideration. However, if the Court determines to hear respondents' challenge in No. 83-1075 to the definition employed by the court of appeals in applying the term "intelligence source" in 50 U.S.C. § 403(d)(3) to the unique facts of this case, it should also review the issue raised here. The court of appeals' failure to provide any explanation of its apparent decision to permit the withholding of the names of institutions as "intelligence sources" should not stand, particularly since there was no evidence offered to show that identification of these institutions — which played no role in

the research, and which were generally unaware that CIA-sponsored research was being conducted at their institutions — would lead to the identification of exempt researchers.

CONCLUSION

If this Court grants the petition for a writ of certiorari in No. 83-1075, it should also grant this cross-petition. If the petition in No. 83-1075 is denied, this petition should also be denied.

Respectfully submitted,

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